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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1565

STATE OF IOWA,

Petitioner,

vs.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

STATE OF IOWA,

Petitioner,

vs.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of the State of Iowa, on behalf of the Petitioner, the State of Iowa, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 26, 1974.

OPINION BELOW

The opinion below by a divided court of the United States Court of Appeals for the Eighth Circuit, filed February 26, 1974, is unreported and appears at Appendix A.

JURISDICTION

On the 26th day of February, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment. (See Appendix A) On a motion by Petitioner, the State of Iowa, a Stay of issuance of the mandate was granted on March 21, 1974, provided that within thirty (30) days there is filed with the Clerk of the Court for the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed. (See Appendix B) The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In this particular instance, are goods (and activities related thereto), which are moved in interstate commerce to the State of Iowa for use by it in connection with the operation of its hospitals, delivered into the actual physical possession of the State of Iowa as the ultimate consumer thereof, thus exempting Iowa from the Fair Labor Standards Act?

2. In this particular instance, is the State of Iowa an "enterprise engaged in Commerce" within the meaning of the Fair Labor Standards Act in serving Iowa residents (public charges) in a purely local operation with only local and not interstate considerations, when it, in isolated and incidental occasions, employs interstate facilities in carrying out its duties?

3. If the State of Iowa is covered by the Fair Labor Standards Act, does the Eleventh Amendment bar recovery of retroactive payments to employees from State biennium appropriations for current expenditures?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Tenth and Eleventh Amendments to the Constitution of the United States and the pertinent portions of the Fair Labor Standards Act [29 U.S.C. §§203(i), 203(j), 203(r)(1), 203(s)(4), 206(b), 207(a)(2), 211(c), 215(a)(2), 215(a)(5), 216(c) and 217] are set forth in Appendix C.

STATEMENT OF THE CASE

The Respondent here, the United States Secretary of Labor, seeking to enforce the Fair Labor Standards Act, Title 29 U.S.C. §201 et seq., filed a Complaint in the United States District Court for the Southern District of Iowa against the State of Iowa, on October 1, 1971. This action was commenced by the United States Secretary of Labor against the State of Iowa pursuant to Title 29 U.S.C. §216(c) and §217 (Fair Labor Standards Act).

On June 8, 1973, in the cause then pending in the United States District Court for the Southern District of Iowa the District Court held that certain institutions operated by the State of Iowa constituted enterprises having employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person and imposing liability on the State of Iowa pursuant to the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201 et seq.), and issuing an injunction enjoining and restraining the State of Iowa from violation of 29 U.S.C. §§215(a)(2) and (a)(5).

On June 26, 1973, the State of Iowa filed in the United States District Court, Southern District of Iowa, its notice of appeal to the United States Court of Appeals for the Eighth Circuit and a Motion for Stay of Order and Suspension of Injunction.

On August 23, 1973, the United States District Court, Southern District of Iowa, granted the State of Iowa the requested Stay order pending the disposition of the cause on appeal.

On February 26, 1974, the United States Court of Appeals for the Eighth Circuit filed its decision affirming the order of the United States District Court for the Southern District of Iowa.

On March 12, 1974, the State of Iowa requested a Stay of Mandate pending its petition for a writ of certiorari to the United States Supreme Court. On March 21, 1974, the United States Court of Appeals for the Eighth Circuit granted a Stay of the Mandate.

The facts relevant to the questions presented by this petition are undisputed and therefore may be introduced to the Court in a summary fashion.

This action was brought by the Secretary of Labor seeking to enforce the Fair Labor Standards Act (29 U.S.C. §201 et seq.) against the State of Iowa in the District Court of the United States for the Southern District of Iowa. The State of Iowa, through its Department of Social Services, owns and operates nine (9) institutions which function as hospitals and are institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises or are schools for the mentally or physically handicapped or gifted children.

The Secretary of Labor of the United States alleges that at said institutions the State of Iowa has violated or is violating the minimum wage provisions of 29 U.S.C. §206(b) and §215(a)(2), the overtime provisions of §207(a)(2) and §215(a)(2) and the record keeping provisions of §211(c) of the Fair Labor Standards Act.

Each of the institutions has received and regularly receives, either directly or indirectly, by purchase or otherwise, substantial amounts of medicines, drugs, and other medical supplies, foods, cleaning supplies, office supplies, equipment, bedding, linen, towels, appliances, therapeutic equipment, clothing and other supplies which were manufactured or produced outside of the State of Iowa and transported into Iowa from other states. Certain categories of employees at the named institutions regularly handle or work on this merchandise.

Other employees, in the regular course of their duties, prepare and/or receive purchase orders, shipment orders, invoices, bills, checks and other correspondence which is sent to or received from manufacturers, producers or suppliers located outside the state. The institutions also have employees who receive deliveries of goods transported to the State of Iowa from other states and who handle, store and move within the institution such merchandise after delivery.

Six institutions have employees who transport or accompany patients or residents to points outside of Iowa for treatment, diagnosis or other purposes. Approximately twelve (12) times a year was the most any institution employees made such a trip.

All but one institution stated that it had employees who, in the regular course of their duties, place or receive out-of-state telephone calls.

These above enumerated activities are directly related to obtaining "goods" which the Petitioner feels are not "goods" within the meaning of 29 U.S.C. §203(i) and include other activities which are so incidental to the primary purpose of the local operation of the institutions that the sovereign State of Iowa is exempt from the Act.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES IMPORTANT TENTH AND ELEVENTH AMENDMENT QUESTIONS, NOT ONLY FOR THE SOVEREIGN STATE OF IOWA BUT FOR OTHER STATES WHICH HAVE STATE OWNED AND STATE OPERATED INSTITUTIONS "PRIMARILY ENGAGED IN THE CARE OF THE SICK, THE AGED, THE MENTALLY ILL OR DEFECTIVE WHO RESIDE ON THE PREMISES, OR A SCHOOL FOR MENTALLY OR PHYSICALLY HANDICAPPED OR GIFTED CHILDREN", 29 U.S.C. §203(s) (4), Fair Labor Standards Act. [Such grounds held sufficient in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957).]

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED UPON SUBSTANTIAL CONSTITUTIONAL QUESTIONS WHICH THIS COURT EXPRESSLY RESERVED FOR CONSIDERATION IN AN ACTUAL FACT SITUATION SUCH AS HERE INVOLVED. [*Maryland v. Wirtz*, 392 U.S. 183 (1968.] [Certiorari granted in similar situations: *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, (1934); *Federal Trade Commission v. Travelers Health Assn.*, 362 U.S. 293, 297 (1960).]

III. PETITIONER FEELS THAT THE COURT OF APPEALS HAS MISCONSTRUED, MISAPPLIED OR MISCONCEIVED THE OPINION IN *MARYLAND V. WIRTZ*, SUPRA, AND DICTA IN *EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE V. DEPARTMENT OF PUBLIC HEALTH & WELFARE*, 411 U.S. 279, (1973). Review by this Court on such grounds appear in *Upshaw v. United States*, 335 U.S. 410 (1948); *Wilkinson v. United States*, 365 U.S. 399, 401 (1961); *Schlude v. Commissioner*, 372 U.S. 128, 130 (1963).]

IV. THERE IS A NEED FOR THIS COURT TO FURTHER CONSIDER AND REVIEW IMPORTANT CONSTITUTIONAL LAW QUESTIONS IN A FACTUAL SITUATION SQUARELY BEFORE

IT TO CLARIFY PREVIOUS DECISIONS AND THEIR IMPLICATIONS, i.e. *Maryland v. Wirtz*, supra, and *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, supra. [This court has reviewed prior decisions and clarified them. *Marchetti v. United States*, 390 U.S. 39, 41 (1968); *Afroyim v. Rusk*, 387 U.S. 253, 255, 256 (1967); *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967); *Edelman v. Jordan*, No. 72-1410, U.S.S.C. March 25, 1974, 42 U.S.L.W. 4419.

I. THE "ULTIMATE CONSUMER" ARGUMENT -- THE SOVEREIGN STATE OF IOWA IS THE ULTIMATE CONSUMER OF "GOODS".

The issue here is whether "goods" delivered to the sovereign State of Iowa for use in the operation of its state owned hospitals for its residents and public charges are "goods delivered into the actual physical possession of the ultimate consumer" under facts here presented and thus exempt the State of Iowa from coverage of the Fair Labor Standards Act. Conceivably some state hospitals could be utilizing goods as a "producer, manufacturer or processor" of goods and thus be covered by the Act. [29 U.S.C. §203(i)]

This question was reserved by this Court in *Maryland v. Wirtz*, 392 U.S. 183, (1968) at 201, which concluded with the words:

> "We think the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production. Such institutions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 87 L.Ed. 460, 63 S.Ct. 332, may be considered as occasion requires."

In furnishing food, shelter and treatment, it is true that Iowa utilizes items brought into Iowa or contracted for via interstate facilities. But, the items, medicines, foods, beds, laundry items, cleaning supplies, office supplies, building materials, and such are contracted for by the sovereign State of Iowa, paid for by the State of Iowa, remain under the control of the State of Iowa, and are dispensed to the public charges who reside in its institutions under the direction of the State of Iowa. Thus employees are not handling goods other than in the course of their employment with the ultimate consumer. The test is whether the articles have ceased movement in interstate commerce and reached their ultimate destination.

In his dissent from the Eighth Circuit Opinion herein, Judge Gibson distinguishes cases cited by the majority opinion, namely *Wirtz v. Melos Construction Corp.*, 408 F.2d 626 (1969), and *Brennan v. Dillion*, 483 F.2d 1334 (1973). The factual situation in neither case involved an institution, state or private. Both were commercial enterprises which performed services and furnished goods to someone else, i.e., a resale of the items. *Melos* involved a building contractor and *Dillion* an apartment house owner and operator. Obviously, the customer having a house built has some rights to reject the building or the goods incorporated therein and likewise the tenant can move if dissatisfied with the goods or services furnished him via the landlord. Here, resident patients in governmental health institutions have no free choice of personal movement nor right of selection of the kind, quality nor quantity of goods, medicines or services.

Applying the principles enunciated in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 87 L.Ed. 460, 63 S.Ct. 332 (1943), these residents are not the "ultimate consumer". The test laid down in *Walling* is that there must be a factual situation which amounts to "a practical continuity of movement of the goods until they reach the customers for whom they are intended", i.e., shipments to a wholesaler to fill prior orders or contracts for resale to customers.

Here, there are no employees handling "goods" except goods

which had ceased movement in interstate commerce as they have reached the sovereign State of Iowa as "the customer(s) for whom they are intended" under the *Walling v. Jacksonville,* supra, test.

II. THE STATE OF IOWA IS NOT "ENGAGED IN COMMERCE" OR "IN THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

The purpose of the Act is to prevent unfair competition or prevent labor strife [*Maryland v. Wirtz,* supra] and to protect the retailer [*Brennan v. Dillion,* supra, so heavily relied upon by Respondent and in the majority opinion]. Here there is no competition between the State locally operated institutions with public funds and interstate businesses. Also, here there is no retailer to be protected as no retailer is attempting to provide like goods and services to residents in the institutions in competition with the State.

In *Hodgson v. Hyatt Realty,* 353 F.Supp. 1363 (M.D. N.C. 1973), aff'd sub nom. *Brennan v. Hyatt Realty,* No. 73-1869 (4th Cir., filed Jan. 10, 1974), the State of North Carolina made license plates but not in competition with interstate businesses nor retailers. There the Court, at page 1374, said:

> "True, some of the items and information acquired may move interstate. However, such movement is incidental to the intra-state activity of tax collection, and not incidental to an interstate transaction . . . "

There is no claim by Respondent that the State is engaged in the production of goods for commerce. The claim is made, however, that the State is an enterprise engaged in commerce. The foregoing division demonstrates that the items which were moved interstate are not "goods" within the meaning of the Act.

The State is also not an enterprise "engaged in commerce". As stated by Judge Gibson in his dissent herein:

> "The operation of these institutions by the State of Iowa is a purely local operation, a service provided for its residents out of purely local, not interstate considerations. The mere use of interstate facilities by employees as an incident of carrying out a purely local business does not constitute engaging in commerce. *Stevens v. Welcome Wagon International, Inc.*, 390 F.2d 75, 77 (3rd Cir. 1968); *Chambers Const. Co. v. Mitchell*, 233 F.2d 717, 722 (8th Cir. 1956); *Hodgson v. Hyatt Realty*, 353 F.Supp. 1363, 1373-74 (M.D.N.C. 1973), *aff'd sub nom. Brennan v. Hyatt Realty*, No. 73-1869 (4th Cir., filed Jan. 10, 1974); *Wirtz v. Sherman Enterprises, Inc.*, 229 F.Supp. 746, 752 (D.Md. 1964)."

This is in keeping with the language in *Walling*, supra, where at 317 U.S. 564 at 570 we read:

> "The evidence said to support it [a business 'in commerce'] is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.
>
> "In this connection, we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. [Citations congressional history]"

Iowa was not using its institutions to produce goods for commerce or otherwise support an enterprise engaged in commerce as stated by Justice Douglas in the dissent in *Maryland v. Wirtz*, 392 U.S. 183 at 205:

> "... Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] ... on commercial intercourse.'? *Atlanta Motel v. United States*, 379 U.S. 241, 257, 13 L.Ed. 2d 258, 268, 85 S.Ct. 348.
>
> "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. ...

> "Whether, in a given case, a particular commerce power regulation by Congress of state activity is permissible depends on the facts. The Court must draw the 'constitutional line between the State as government and the State as trader . . . ' *New York v. United States,* supra, at 579, 90 L.Ed. at 332 (opinion of Mr. Justice Frankfurter). In this case the State as a sovereign power is being seriously tampered with, potentially crippled."

III. PROTECTION OF FISCAL POLICY ARGUMENT – UNDER THE TENTH AMENDMENT CONGRESS SHOULD NOT DRAW UP STATES' BUDGETS UNDER THE GUISE OF COMMERCE POWER.

Retroactive payments from public funds of the State treasury allocated in a biennium appropriation for current needs of the State owned and operated mental (and other) instituions, may upset and even wreck the State's fiscal position in its desire to furnish necessary and adequate services to its aged, mentally ill and to gifted and handicapped children.

There would seem little doubt that a judgment against the State of Iowa, in a federal court, will to some extent now, or in the near future, force increased taxes, curtail services in this area, reduce services in other areas or cause hesitation on the part of the State in expanding services. See *Maryland v. Wirtz,* supra, 392 U.S. at 202-203, Douglas, J., dissenting.

As recognized by the majority in *Edelman v. Jordan,* supra, the federal constitution protects the States from extractions from States' treasuries for retroactive payments in the welfare area. As in the welfare area, it is a severe blow to the State's treasury to order retroactive payments in the area of State owned and operated institutions; the biennium appropriation for current expenses also warrants constitutional protection. Certainly, in this instance, the sovereign State of Iowa was acting in good faith in its belief that it had constitutional immunity under *Maryland v. Wirtz,* supra, which left questions unanswered.

The majority of the Circuit Court in requiring retroactive

payments states: "Secondly, we have held that the financial hardship caused by the order is not a valid basis on which to deny the employees their remedy . . . " [*Hodgson v. Taylor,* 439 F.2d 288, 290 (8th Cir. 1971); *Wirtz v. Jones,* 340 F.2d 901, 904-905 (5th Cir. 1965)] citing cases against private employees instead of recognizing the severe strain upon public funds of a sovereign state and respect for its fiscal problems as recognized in *Edelman v. Jordan,* supra, – i.e., the majority of the Circuit Court misapplied *Hodgson,* supra, and *Jones,* supra, as being analogous to a state-employer situation since there is no constitutional protection for private employers.

Even in a Section 1983 action, this Court in *Edelman v. Jordan,* supra, recognized that " . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra."* [42 U.S.L.W. at 4427]

The circuit Court in *Edelman,* such as the Circuit Court here, refers to the retroactive payments as "equitable restitution"; but this court at page 42 L.W. 4424 said:

> "While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution', it is in practical effect damages against the State."

Whereupon, this court held that the Eleventh Amendment barred such retroactive payments.

Likewise, the majority of the Court suggests that the Attorney General by stipulating to gathering information of employees in an "attempt to compute and agree on the amount of any unpaid minimum wages and overtime compensation" should the question presented be resolved in favor of the Secretary of Labor, waived the immunity afforded the sovereign State of Iowa. In *Ford Motor Co. v.*

Department of Treasury, 323 U.S. 459 (1945), this Court held that under the Indiana constitution only its legislature and not an official of the executive branch of government could waive state's rights.

CONCLUSION

Petitioners sincerely believe that the "Constitutional line between the State as government and the State as trader" [*New York v. United States*, 326 U.S. 578, 580 (1946)] as it relates to Fair Labor Standards Act coverage of Sovereign States of the United States should be re-examined, not in the abstract, but in the concrete factual setting herein presented.

Thus, petitioners request that this Honorable Court grant the petition for Certiorari and upon a hearing of the issues, reverse the majority opinion of the Circuit Court of Appeals.

Respectfully submitted,

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Attorney General of Iowa

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 73-1500

Peter J. Brennan, Secretary of Labor, United States Department of Labor,	*	
Appellee,	*	
v.	*	Appeal from the United States District Court for the Southern District of Iowa.
State of Iowa,	*	
Appellant.	*	

Submitted: December 12, 1973
Filed: February 26, 1974

Before GIBSON and ROSS. Circuit Judges, and TALBOT SMITH, Senior District Judge.*

ROSS, Circuit Judge.

This action by the Secretary of Labor seeking enforcement of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (FLSA), was

*The Honorable TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation

filed in the district court for the District of Iowa against the State of Iowa. Through its agency, the Department of Social Services, the State of Iowa owns and operates several institutions wherein persons are employed at less than the minimum and overtime wages prescribed by 29 U.S.C. §§206 and 207. Upon stipulated facts the district court held that the State of Iowa was subject to the provisions of the Act. This appeal followed.

The undisputed facts show that each of the nine institutions is either a hospital, an institution primarily engaged in the care of the sick, the aged, mentally ill or defective who reside on the premises, or a school for mentally or physically handicapped or gifted children. Each of the institutions purchases or orders some of its goods and supplies directly from manufacturers, producers or suppliers located outside the state. Each institution has employees in the following categories regularly handling, selling, or otherwise working on, or with, merchandise and supplies received from out-of-state suppliers:

(1) professional, medical, psychiactric and nursing employees who, in the treatment of patients, administer medicines and drugs and use therapeutic equipment and other medical supplies and equipment, substantial amounts of which are manufactured or produced outside the state;

(2) nursing service employees, aides, attendants, and orderlies who, in providing patient care, handle cleaning supplies, medical supplies and equipment, bedding, linens, towels and hospital clothing, substantial amounts of which are manufactured or produced outside the state;

(3) food service and dietary service employees who prepare, serve and dispense food to patients, residents, employees and visitors, substantial amounts of which foods are grown, processed or produced outside the state;

(4) housekeeping, maintenance and custodial employees who, in the regular course of their duties, use cleaning supplies, equipment and appliances, substantial amounts of which are manufactured or produced outside the state;

(5) laundry employees who use and handle cleaning supplies, bedding, linens, towels and hospital clothing, substantial amounts of which are manufactured or produced outside the state;

(6) office and administrative employees who use office supplies and equipment, substantial amounts of which are manufactured or produced outside of state.

Section 6 and Section 7 of the Fair Labor Standards Act, 29 U.S.C. §§206 and 207, provide that every employer shall pay minimum and overtime wages to each of his employees who is engaged in commerce or in the production of goods for commerce *or is employed in an enterprise engaged in commerce or in the production of goods for commerce.* An "enterprise engaged in commerce or in the production of goods for commerce" is defined to be:

> [A]n enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which --
>
> * * *
>
> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

29 U.S.C. §203(s).

The adoption of the "enterprise concept" in 1961 by Congress has been held to be clearly within the power Congress under the

Commerce Clause. *Maryland v. Wirtz,* 392 U.S. 183, 188-193 (1968). Similarly, the amendment modifying the definition of "employer" to remove the exemption of the states with respect to the employees of certain hospitals, institutions, and schools was upheld. For the federal government, when acting within a delegated power, may override countervailing state interests. *Maryland v. Wirtz, supra,* 392 U.S. at 195. *See also Sanitary District v. United States,* 266 U.S. 405 (1925). Thus, if a state engages in economic activities that are validly regulated by the federal government when engaged in by private persons, the state too may be forced to conform its activities to federal regulation. *Maryland v. Wirtz, supra,* 392 U.S. at 197. *See also United States v. California,* 297 U.S. 175 (1936). Yet a state may assert its sovereign immunity in suits brought by private individuals under 29 U.S.C. §216(b) to enforce the Act. *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 285 (1973) [*Employees v. Missouri Public Health Dept.*]. The vehicle to enforce a state's conformity to the Act is at issue in this case. Based upon reasons expressed hereafter, we find that the extension of FLSA coverage to state employees is not made totally meaningless by the availability of a sovereign immunity claim.

Section 216(c) and Section 217 give the Secretary of Labor the authority to bring suits for violations of the Act. *Cf. Employees v. Missouri Public Health Dept., supra,* 411 U.S. at 285-286. Such suits by the Secretary of Labor in enforcing the FLSA, though brought in public interest, are suits by the United States. *See Mitchell v. Robert DeMario Jewelry,* 260 F.2d 929, 932 (5th Cir. 1958), *rev'd on other grounds,* 361 U.S. 288 (1960) (and cases cited therein). Suits by the United States against a state are not barred by the eleventh amendment. *United States v. Mississippi,* 380 U.S. 128, 140-141 (1965). Thus, this suit against the State of Iowa is not barred by a claim of sovereign immunity. The only remaining question here is whether the particular institutions are subject to the Act. This question must be answered in the affirmative if we can find

that these institutions are enterprises engaged in commerce or in the production of goods for commerce, or, more simply put, if these institutions employ *any* employees who are engated in commerce or in the production of goods for commerce. *See* 29 U.S.C. §203(s).

Under both of the two criteria established by the Act, these institutions must be said to be enterprises within the purview of the Act. First, courts have repeatedly held on previous occasions that activities of the nature performed by some of the employees of the institutions are activities in interstate commerce. Specifically, the activities of employees in sending, preparing, and receiving purchase orders, shipment orders, invoices, bills, and checks;[1] in receiving direct deliveries of goods transported interstate and in handling, storing and moving such goods after their delivery but before disposition to the ultimate consumer; [2] in regularly transporting or accompanying patients or residents to points outside the state for treatment, diagnosis, and other purposes;[3] and in placing interstate telephone calls as a part of a regular course of business[4] must be held to be activities performed in interstate commerce. Due to the interstate nature of the employees' activities, each of the institutions is an enterprise engaged in commerce. 29 U.S.C. §203(s).

Secondly, as defined by 29 U.S.C. §203(s), an enterprise engaged in interstate commerce may be one where the employees simply handle, sell or otherwise work on goods that have moved in interstate commerce. According to the undisputed facts, many employees handle articles which have moved in interstate com-

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[1] *Wirtz v. First State Abstract & Ins. Co.*, 362 F.2d 83, 87 (8th Cir. 1966).

[2] *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F.2d 331 (8th Cir. 1944).

[3] *Mitchell v. Kroger Co.*, 248 F.2d 935 (8th Cir. 1957).

[4] *Durkin v. Joyce Agency*, 110 F.Supp. 918 (N.D. Ill. 1953), *rev'd*, 211 F.2d 241 (7th Cir. 1954), *rev'd per curiam*, 348 U.S. 945 (1955).

merce.[5] Those activities bring the particular institutions involved within the purview of the Act if the articles handled by the employees can be determined to be "goods" as defined by the Act. 29 U.S.C.§203(i). In other words, if the articles are wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, that have not reached their delivery into the *actual physical possession of the ultimate consumer thereof,* then they are goods within the definition of the Act and the mere handling of those goods by some institution employee prior to their delivery to the ultimate consumer renders the institution an enterprise engaged in commerce. Many cases have held that the institution itself is not the ultimate consumer of the articles set forth in the margin above. *See, e.g., Brennan v. Dillion,* 483 F.2d 1334 (10th Cir. 1973); *Wirtz v. Melos Construction Corp.,* 408 F.2d 626 (2nd Cir. 1969).[6] The constitutionality of 29 U.S.C. §203(s) was upheld by the Court in *Maryland v. Wirtz, supra.* Thus, we conclude that each of the institutions are enterprises engaged in commerce.

Finally, we review the appropriateness of the relief granted by the district court. Section 17 of the Act provides:

> The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title,

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[5]For example, it was agreed that medical employees administer drugs that have moved interstate, that employees that provide patient care handle cleaning supplies that have moved interstate, that food service employees dispense food that has moved interstate, and that housekeeping and laundry employees handle supplies that have moved interstate.

[6]The profit-seeking nature of the enterprises at issue in the preceding authority does not distinguish them from the State of Iowa which in some instances does not impose any additional charge in the delivery of the goods to the patient or resident. The Act specifically rejects profitability as a criterion for inclusion under the enterprise concept. 29 U.S.C. § 203(r)(1). Thus, the absence of profitability does not render the State of Iowa the ultimate consumer with respect to the goods.

> including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this [Act] . . .

29 U.S.C. §217. The State of Iowa argued that a restitution award of the nature described above should not have been awarded by the district court.

Accordingly, first we note that the State of Iowa may not assert its sovereign immunity in a suit brought by the United States against the state. *United States v. Mississippi, supra.* Secondly, we have held that the financial hardship caused by the order is not a valid basis on which to deny the employees their remedy or to allow a wrong against the public to go uncorrected in a suit brought under the FLSA. *Hodgson v. Taylor,* 439 F.2d 288, 290 (8th Cir. 1971). Next, we find no merit in the argument that this action is, in substance, an action by the employees against the state to which the holding of the Second Circuit in *Rothstein v. Wyman,* 467 F.2d 226 (2nd Cir. 1972), *cert. denied,* 411 U.S. 921 (1973) should be applicable. Rather:

> [T]he purpose of the injunction . . . is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest. It is true that as a result, money may pass from the employer into the pocket of the employee or, if he is not available, then into the coffers of the United States Treasury, but that enforced payment, which must be made even if the employee or his representatives or heirs no longer exist to claim it, is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about general compliance with [the Act].

Wirtz v Jones, 340 F.2D 901, 904-905 (5th Cir. 1965). Finally, we note that the parties to this suit have entered into a stipulation that "should the questions presented be resolved in favor of [the Secretary of Labor], the parties will attempt to compute and agree

upon the amount of any unpaid minimum wages and overtime compensation due defendant's employees." Due to the foregoing considerations, we find that the restitution order is appropriate.

For the reasons hereinbefore expressed, the judgment of the district court is affirmed.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I think the majority takes the final step in adopting an all-encompassing rationale of what constitutes interstate commerce. While recent cases in this field lend support to the majority in the broad language employed, the facts of those cases do not support the absolute denigration of State sovereignty that this case accomplishes. Admittedly, many prior decisions have taken great liberty with the concept of interstate commerce, but surely the framers of our Constitution never thought it would be so expansively construed as to reach the sovereign activities of a state. States engaged in performing their necessary, proper and sovereign governmental functions are now emmeshed within the concept's all-inclusive tenacles.

The concept of interstate commerce is now expanded to nullify the constitutional and sovereign rights of States, not only in the handling of their business activities, but in the conduct of their manifest governmental activities as well. The time has come when courts should take a realistic approach and accord to the states their remaining vestiges of sovereignty, presently being ground to ashes under the expansive interpretations now in vogue as to what constitutes interstate commerce. The result here can only be justified if we accept a premise that everyone employed in these United States is engaged in interstate commerce.

It is a fiction, albeit a legal fiction widely accepted, to hold that the State of Iowa, by its operation of these nine institutions as part of its sovereign power to provide for the general welfare of its

citizens, is engaged in interstate commerce. Moreover, the resultant effect of our decision is so disruptive of and harmful to legitimate state interests[1] that the courts should not require compliance by a state as an employer with the Fair Labor Standards Act (FLSA) unless clearly mandated to do so. I do not believe the result reached by the majority is mandated by the FLSA.

First, I disagree with the majority's conclusion that the institutions involved are not the ultimate consumers of the goods allegedly a part of interstate commerce. If the institution is the ultimate consumer, then it has no employees engaged in handling goods that have moved in interstate commerce.[2]

As support for its conclusion that an institution is not the ultimate consumer, the majority relies upon *Brennan v. Dillion,* 483 F.2d 1334 (10th Cir. 1973) and *Wirtz v. Melos Construction Corp.,* 408 F.2d 626 (2d Cir. 1969). Neither of these cases involved institutions, state or private. In *Dillion,* the defendant was an individual who operated three apartment complexes. The court held that maintenance employees using various supplies were covered by FLSA as the tenants were said to be the ultimate consumers of the supplies, not the defendant, relying *inter alia* upon the rationale that there was a resale of the supplies because their cost was passed on to

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[1]There can be no doubt that the import of this decision will require an adjustment in the State's fiscal policy, either by forcing a reduction of services in this or other areas or an increase in its citizens' tax burden.

> "It is one thing to force a state to purchase safety equipment for its railroad and another to force it to spend several million more dollars on hospitals and schools or substantially reduce services in these areas."

Maryland v. Wirtz, 392 U.S. 183, 203 (1968) [Douglas, J. dissenting]

[2]29 U.S.C. § 203(i).

the tenants as part of their rental.[3] The existence of a resale has been an important factor in the courts' determination of who is the ultimate consumer for purposes of 29 U.S.C. §203(i). *Brennan v. Dillion, supra; see also, Goldberg v. Furman Beauty Supply, Inc.*, 300 F.2d 16, 19 (3rd Cir. 1962); *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831 (4th Cir. 1959), *cert. denied*, 360 U.S. 934 (1959).

Melos, which involved the coverage of a building contractor's employees, makes no mention at all of 29 U.S.C. §203(i) and the "ultimate consumer" exemption contained therein. It seems obvious that a building contractor is not an institution. Further, he may well be considered an ultimate consumer. In *Barbe v. Cummins Const. Co.*, 49 F.Supp. 168 (D.Md.), *aff'd* 138 F.2d 667 (4th Cir. 1943), the court held that a building contractor was the ultimate consumer of building materials, not a purchaser of the building in which the materials are incorporated.

I would hold that these State institutions are ultimate consumers. A contrary holding necessarily implies that the patients of these State-operated and State-financed institutions are the ultimate consumers. This conclusion is untenable when talking about the use of cleaning supplies, laundry items, office supplies and medical equipment. The State is the user of these items, not the patient, and

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[3] *But see, Shultz v. Travis Edwards, Inc.*, 320 F.Supp. 834 (W.D.La. 1970), *rev'd on other grounds sub nom. Hodgson v. Travis Edwards, Inc.*, 465 F.2d 1050 (5th Cir.), *cert. denied*, 409 U.S. 1076 (1973); *Shultz v. Arnheim & Neely, Inc.*, 324 F. Supp 987 (W.D.Pa. 1969), *rev'd on other grounds sub nom. Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609 (3rd Cir. 1971), *rev'd* 410 U.S. 512 (1973); and *Shultz v. Wilson Building, Inc.*, 320 F.Supp. 664, 669 (S.D.Tx. 1970), *aff'd sub nom. Brennan v. Wilson Building, Inc.*, 478 F.2d 1090 (5th Cir. 1973), where the owners of rental space were found to be the ultimate consumers of supplies used in their business.

its employees using these items thus are not handling "goods" as defined in §203(i).[4]

It is possible to consider the patient as the ultimate consumer of the drugs, medicines and food supplies, but in the circumstances of this case I believe it erroneous to do so. "Ultimate consumer" is employed in the Act as a means of determining when articles have ceased their movement in interstate commerce. The concept provides protection from the "hot goods" liability provisions contained in 29 U.S.C. §215(a)(1).[5] The drugs and medicines are dispensed by State employees in the course of State treatment of State patients residing in State institutions. These drugs and medicines have ceased their movement in commerce upon delivery to the State and the State is entitled to the benefit of the ultimate consumer exception.

The same rationale is equally applicable to those food items served to patients. However, it was stipulated that in two of the institutions canteens were operated which for a charge served visitors. This is not enough to find that interstate commerce is involved. As the State of Iowa correctly argues, such activities must be *related to the business purpose* of the enterprise.[6] This service, provided only as a convenience to visitors, is not related to the primary purpose of the institutions. *Cf., Shultz v. Travis Edwards, Inc., supra,* 320 F.Supp. at 839-40.

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[4]This has been recognized in the regulations promulgated by the Secretary of Labor. *See,* 29 C.F.R. § 779.240(a)(1970) which provided in part:

> However, the mere fact that employees in conducting the business of the enterprise or establishment, are using machinery, equipment, work tools, and the like, which may have been moved in or produced for commerce, does not mean that they are handling, selling, or otherwise working on "goods" that have been moved in or produced for commerce within the meaning of section 3(s).

[5]*See* 29 C.F.R. § 776.21 (1973) which in essence provides that the "hot goods" provision creates a liability for anyone transporting, delivering or selling in commerce, goods in the production of which the minimum wage and overtime provisions of the Act were violated.

[6]29 U.S.C. § 203(r).

Nor do I think that the second part of the enterprise test, whether there are any employees engaged in commerce, is met by these institutions. It is stipulated that employees at all of these institutions did make use of interstate facilities in carrying out their duties. This alone is not enough. The operation of these institutions by the State of Iowa is a purely local operation, a service provided for its residents out of purely local, not interstate considerations. The mere use of interstate facilities by employees as an incident of carrying out a purely local business does not constitute engaging in commerce. *Stevens v. Welcome Wagon International, Inc.*, 390 F.2d 75, 77 (3rd Cir. 1968); *Chambers Const. Co. v. Mitchell*, 233 F.2d 717, 722 (8th Cir. 1956); *Hodgson v. Hyatt Realty*, 353 F.Supp. 1363, 1373-74 (M.D.N.C. 1973); *aff'd sub nom. Brennan v. Hyatt Realty*, No. 73-1869 (4th Cir., filed Jan. 10, 1974); *Wirtz v. Sherman Enterprises, Inc.*, 229 F.Supp. 746, 752 (D.Md. 1964).

> The test is whether the work is directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity.

Mitchell v. C. W. Vollmer & Co., Inc., 349 U.S. 427, 429 (1955).

It is only when engaging in interstate communication is a material portion of an employer's business activity that the employee engaging in the communication should be considered to be engaging in interstate commerce.

If the actions of the State in providing food, shelter, and treatment for its public charges constitutes interstate commerce, then nothing is left of a state's sovereignty. The heavy hand of the federal government, with its gigantic bureaucracy practicing suffocating paternalism, reaches all things and all people.

While recognizing the remedial purpose of the Act and the

number of cases holding that the Act should be liberally construed to effectuate its beneficent purpose,[7] the remedial purpose of the Act should not be utilized to emasculate the sovereign rights of the states unless there is a clear constitutional basis for imposition of federal control on a state's sovereignty.

I would reverse the decision of the District Court and hold that the State of Iowa is not subject to the provisions of the Fair Labor Standards Act, 29 U.S.C. §203 *et seq.*, in its operation of these nine institutions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[7] *See, e.g., Stevens v. Welcome Wagon International, Inc.*, 390 F.2d 75 (3rd Cir. 1968); *Wirtz v. First State Abstract & Ins. Co.*, 362 F.2d 83 (8th Cir. 1966).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 73-1500. September Term, 1973

Peter J. Brennan, Secretary of Labor, United States Department of Labor, Appellee, vs. State of Iowa, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Northern District of Iowa.

On consideration of motion of appellant for stay of the mandate in this cause pending petition to the Supreme Court of the United States for writ of certiorari, it is now here ordered that the issuance of the mandate be, and the same is hereby, stayed for a period of thirty days from and after this date. If within said period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 21, 1974

APPENDIX C

Tenth Amendment, Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Eleventh Amendment, Constitution of the United States:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Title 29 U.S.C. §203(i):

> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

Title 29 U.S.C. §203(j):

> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Title 29 U.S.C. §203(r)(1):

> (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any

person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit, or

Title 29 U.S.C. §203(s)(4):

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the

annual gross volume from the business of such enterprise is not less than $350,000;

Title 29 U.S.C. § 206(b):

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

Title 29 U.S.C. § 207(a)(2):

(a)(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

Title 29 U.S.C. § 211(c):

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and

of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

Title 29 U.S.C. § 215(a)(2):

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

Title 29 U.S.C. § 215(a)(5):

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Title 29 U.S.C. § 216(c):

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid

minimum wages or unpaid overtime compensation under section 206 or 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

Title 29 U.S.C. § 217:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a) (2) of this title the restraint of any withholding

of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title . . .)

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

STATE OF IOWA,

Petitioner,

vs.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lorna Lawhead Williams, Special Assistant Attorney General of Iowa, hereby certify that on this 17th day of April, 1974, three (3) copies of the Petition For A Writ Of Certiorari were mailed, correct air mail postage prepaid, to William J. Kilberg, Solicitor of Labor, United States Department of Labor, Washington, D. C., 20210, Counsel for Respondent. I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1565

STATE OF IOWA, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 494 F. 2d 100. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1974. The petition for a writ of certiorari was filed on April 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of sovereign immunity extends to suits by the Secretary of Labor to enforce the Fair Labor Standards Act against a State to protect employees of state hospitals and institutions primarily engaged in the care of the sick, the aged, or the mentally ill or defective.

2. Whether such hospitals and institutions are enterprises subject to the coverage of the Act, when they have employees who are regularly engaged in interstate commerce and in the handling of articles which have moved in interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Amendments to the Constitution and provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth at Pet. App. C. However, the text of Section 3(s)(4) of the Act, 29 U.S.C. 203(s)(4), is incorrectly reprinted. The correct text, before the amendments of 1974, was as follows:

> Section 3(s): "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> * * * * *
>
> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

This section was amended after the period here in question by the Fair Labor Standards Amendments of 1974, P.L.

93-259, Section 6(a)(5), 88 Stat. 59, effective May 1, 1974. These amendments added the following sentence at the end of Section 3(s):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.[1]

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, as amended, to enjoin the State of Iowa, through its agency, the Department of Social Services, from violating the minimum wage, overtime, and recordkeeping provisions of the Act, and to require the payment of back wages due to employees in nine specified hospitals and related institutions operated by the State (Pet. 4-5).

The facts were stipulated. Each of the nine institutions regularly receives substantial amounts of medicines, drugs, and other medical supplies, foods, cleaning supplies, office supplies, equipment, clothing and other supplies manufactured or produced outside of Iowa and transported

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[1]The opening paragraph of Section 3(s) was also changed to read as follows (with the changes shown by italics):

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, *or* employees handling, selling, or otherwise working on goods *or materials* that have been moved in or produced for commerce by any person, and which—

In addition, the following was inserted after subsection (4): *or (5) is an activity of a public agency.*

* * * * *

into Iowa from other States. In each of the institutions, there are employees who regularly handle, sell, or work on these materials (Pet. 5). Moreover, each of the institutions in question has employees who, in the course of their duties, regularly prepare, send or receive purchase orders, shipment orders, invoices, bills, checks and other correspondence to or from manufacturers, producers or suppliers located outside the State (Pet. 5). Each also has employees who work in warehouses or storerooms and receive direct deliveries of articles transported to Iowa from other States, and handle, store, and move the articles after delivery (*ibid.*). Six of the nine institutions have employees who regularly transport or accompany patients or residents to points outside the State for treatment, diagnosis, or other purposes; eight of the nine have employees who in the regular course of their duties, place or receive telephone calls to or from points outside of Iowa (Pet. 5-6).

Both the district court and the court of appeals held that the institutions in question are covered by the Act as enterprises within the definition of Section 3(s)(4). They concluded also that state immunity did not extend to enforcement suits brought by the Secretary of Labor. Accordingly, the court of appeals affirmed the district court's order granting the prayer for an injunction against future violations and for restitution of unpaid wages due under the Act.

ARGUMENT

Further review of this suit by the federal government to apply federal law to State agencies is not warranted. This Court has repeatedly indicated that States are not immune from such sutis. The decision below correctly interprets the applicable statutory language, and in any event the Fair Labor Standards Amendments of 1974 deprive the decision of any continuing significance.

1. Since 1890, this Court has uniformly held that the States' immunity to suit in a federal court, whether under

the Eleventh Amendment or under the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, does not extend to suits brought by the United States. *United States* v. *Texas*, 143 U.S. 621, 642-646; *Sanitary District* v. *United States*, 266 U.S. 405, 425-426; *United States* v. *California*, 297 U.S. 175, 184-185; *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56-60; *United States* v. *Mississippi*, 380 U.S. 128, 140-141; *Department of Employment* v. *United States*, 385 U.S. 355, 358. That principle was affirmed only last Term in *Edelman* v. *Jordan*, No. 72-1410, decided March 25, 1974, slip op. 17-18, and it of course makes no difference whether the plaintiff is the United States in name or a federal officer suing on its behalf. Indeed, in *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 286, the authority of the Secretary of Labor to enforce the Fair Labor Standards Act was stressed in support of the conclusion that private citizens cannot sue for such enforcement in the federal courts:

> By holding that Congress did not lift the sovereign immunity of the States under FLSA, we do not make the extension of coverage to state employees meaningless. * * * [The Act] gives the Secretary of Labor authority to bring suit * * * . * * * [S]uits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi*, 380 U.S.128, 140-141. [411 U.S. at 285.]

See, also, *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 145-146.

The decision in *Employees* also explicitly disavowed the position urged here by petitioner (Pet. 12-14) that the financial burden of compliance is in itself a barrier to the inclusion of States within the enforcement provisions of the Act:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. [411 U.S. at 284.][2]

2. The Fair Labor Standards Act provisions in issue here were amended in 1974 (P.L. 93-259, Sec. 6(a)(5), 88 Stat. 59), effective May 1, 1974. The court below considered the Act as it stood before this amendment, and correctly concluded that it applied by its terms to the institutions here involved, which petitioner describes as "hospitals and * * * institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises or * * * schools for the mentally or physically handicapped or gifted children" (Pet. 5). Such institutions are specifically enumerated in 29 U.S.C. 203(s)(4), which provided, before May 1, 1974, that any such institution, whether public or private, was a covered enterprise if it had "employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods

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[2] *Edelman* v. *Jordan*, *supra*, relied upon by petitioner, is not to the contrary. In *Edelman*, this Court held that the Eleventh Amendment was violated by a decree in a suit by a private citizen which ordered the State to make retroactive welfare payments. But the Court distinguished situations in which, as here, the suit is brought on behalf of the United States, noting that the line of cases which "reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State," slip op. at 18, were simply not applicable to suits by private citizens. Similarly, the Court's conclusions in *Edelman*, concerning retroactive payments in suits by citizens, are not applicable here.

that have been moved in * * * commerce * * * ."[3] Upon the undisputed facts, each of the institutions has employees who are "engaged in commerce" as well as employees who handle goods that have "been moved in * * * commerce."[4]

(a) The employees of the institutions are admittedly engaged in four classes of activities (Pet. 5), each of which, under settled authority, constitutes engaging in interstate commerce for purposes of the Act: (1) All of the nine institutions have employees who are regularly engaged in the preparation, transmission, and receipt of business correspondence and papers to and from out-of-state points. *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135, 1143 (C.A. 5); *Wirtz* v. *Wardlaw*, 339 F. 2d 785, 787 (C.A. 4). (2) All of the institutions also have employees who regularly receive direct shipments of articles of commerce transported from out-of-state points, and who handle, move, and store such articles upon their arrival. *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, 42 (C.A. 6), certiorari denied, 335 U.S. 854; *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645, 648 [C.A. 5). (3) In eight of the nine institutions, there are employees who regularly handle interstate telephone calls in the course of their duties. *Mitchell* v. *Joyce Agency*, 348 U.S. 945, reversing *(per curiam)* 211 F. 2d 241 (C.A. 7) and affirming 110 F. Supp. 918, 923; *Telephone Answering Service,*

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[3]This language was changed by the 1974 amendments to read "or employees handling, selling, or otherwise working on" such goods. This was done to "reflect more clearly that the 'including' clause was intended as an additional basis of coverage." S. Rep. No. 93-690, 93d Cong., 2d Sess. 17.

[4]It is no defense to assert that the State itself is not "in commerce" (Pet. 10-12). Section 3(s) refers to an enterprise which has *employees* in commerce, or in stated commerce related activities.

Inc., v. *Goldberg*, 290 F. 2d 529, 532 (C.A. 1). (4) And in six of the nine institutions, there are employees who regularly engage in interstate travel in transporting or accompanying patients and residents to out-of-state places for treatment, diagnosis, and other purposes. *Mitchell* v. *Kroger Co.*, 248 F. 2d 935, 939 (C.A. 8). The institutions in question are thus covered enterprises under the provisions of Section 3(s)(4).

(b) Alternatively, the institutions are covered enterprises because they have employees "handling * * * or otherwise working on goods that have been moved in * * * commerce."[5]

Petitioner concedes that each of the institutions regularly receives and uses medicines, supplies, and equipment which come from outside the State and has employees who regularly handle or work on those commodities (Pet. 5). It contends, however, that those commodities were not "goods" because the definition of goods in Section 3(i) (29 U.S.C. 203(i)) excludes articles that are in the physical possession of the "ultimate consumer" (with certain exceptions). Petitioner claims to be the "ultimate consumer" of the medicines, drugs, medical supplies, food, clothes, equipment and the like, which it uses in extending medical and other services to the patients and residents of its institutions (Pet. 8-10).

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[5]The extension of coverage to enterprises with such employees is evidently in recognition of the "obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236), and that the consumption of goods resulting from activities following their interstate movement is an important factor in maintaining the flow of replacement goods. See S. Rep. No. 145, 87th Cong., 1st Sess.; H. Rep. No. 75, 87th Cong., 1st Sess.

The rejection of this contention by the court below was in accord with the decision in *Brennan* v. *Dillion,* 483 F. 2d 1334, 1337 (C.A. 10), which held that the exception in Section 3(i) for the ultimate consumer was intended to protect the retail customer from the provisions of Section 15(a)(1) (29 U.S.C. 215(a)(1)) proscribing the transportation of goods produced in violation of the Act, not to exempt employers who use up materials in the performance of their services. There the tenants of an apartment house complex, and not the operators, were deemed the ultimate consumers of the paints, cleaning materials, and light bulbs used in maintaining the complex.[6] Similarly, here, it is the patients and the residents of the institutions who are the ultimate consumers of the medicines, food, and the like, and of the supplies and equipment used in maintaining the institutions.

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[6]There are no inconsistent decisions of this Court or of the courts of appeals. Indeed, in *Maryland* v. *Wirtz,* 392 U.S. 183, 200-201, this Court refused to conclude that schools and hospitals are the ultimate consumers of the out-of-state products they buy; it noted that such products are put to a wide variety of uses in the institutions involved, implying that at least some such uses are within the Act. The courts of appeals have uniformly concluded that businesses were covered when their employees handled goods that had moved in commerce although such goods were necessarily consumed in the employer's operations: *Wirtz* v. *Melos Construction Co.*, 408 F. 2d 626, 629 (C.A. 2), construction work using concrete made of materials of out-of-state origin; *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F. 2d 689 (C.A. D.C.) automatic laundries using soaps and detergents of such origin; *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F. 2d 658 (C.A. 4), operations of a painting subcontractor using paints and materials of such origin:

Walling v. *Jacksonville Paper Co.*, 317 U.S. 564, does not, as petitioner contends, establish a test for interpreting the "ultimate consumer" exception. That exception appears in the definition of "goods" in Section 3(i) and is therefore applicable to coverage based on engagement in "the production of goods for commerce" or on handling "goods that have been moved" in commerce. *Jacksonville* dealt with a different basis for coverage; it determined only when employees were to be considered "in commerce." No definition of "goods" was there involved.

3. Even if the statute's applicability to state institutions of the kind here involved were debatable under the statute in effect when this suit was commenced, the Fair Labor Standards Amendments of 1974 conclusively settle the matter, by specifically providing that the "employees of an enterprise which is a public agency shall * * * be deemed to be employees engaged in commerce" in all cases. P.L. 93-259, Section 6(a)(5)(E). The amendments also make clear that an enterprise with employees handling goods which have moved in interstate commerce is covered, regardless of whether it also has employees who are in such commerce or producing goods for such commerce. They dispose of the "ultimate consumer" objection by referring not only to "goods," which are defined to exclude items received by ultimate consumers, but also to "materials." P.L. 93-259, Section 6(a)(5). Thus, the issues presented by this case will not recur, since the holding is based on superseded language.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1974.

SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1565

STATE OF IOWA,

Petitioner,

vs.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent, in his Brief In Opposition, relies upon the claim of "mootness" by the 1974 Amendments to the Fair Labor Standards Act.

Actually, the amendment in not re-defining "goods" and in not removing the exception within that definition strengthens, not weakens, Iowa's position.

I

The public agency who is the "ultimate consumer" under the exception within the definition of "goods" is still exempt. Thus, these questions are still before this Court.

None of the cases relied upon by Respondent are applied to Sovereign States whose employees are "handling, selling or otherwise working on" goods consumed by the State within the meaning of the definition of "goods".

Petitioner submits that the addition of the words "or materials" after the word "goods" adds nothing to extend coverage to the State of Iowa. Under the well-known doctrine of statutory construction *noscitur a sociis,* is "a word is known by the company it keeps" – *Jarecki v. G.D. Searle & Co.,* (1960), 367 U.S. 303. This is an ancient doctrine which is described in *Neal v. Clark,* (1877), 95 U.S. 704 at 708 as follows:

> "In Broom's Legal Maxims, p. 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu,* – the coupling of words together shows that they are to be understood in the same sense. . . . In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis,* and referable to the same subject-matter.' "

Because Congress did not delete the word "goods" in the opening sentence of Section 3(s) *"or otherwise* working on *goods or materials . . . and which . . .* " [Emphasis supplied.], Respondent is unable to take comfort by the 1974 Amendment's addition of the last sentence to Section 3(s)(4), reading:

> "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling *or otherwise* working on *goods or materials* that have been moved in or produced for commerce." [Emphasis supplied.]

By the Amendment, in both the opening sentence and the last sentence of §203 (s), Congress extended the coverage *only* to "non-ultimate consumer" factual situations.

In retaining the word "goods" in the "or otherwise" clause appearing both in the opening sentence of §203 (s) and in the last sentence added by the amendment, Congress still permits sovereign States an exemption in a factual setting as here.

This Court in *Porto Rico R. Light & Power Co. v. Mor.*, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944, stated the general doctrine of statutory construction to be:

> "... When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. United States v. Standard Brewery, 251 U.S. 210, 218, ante, 229, 234, 40 Sup. Ct. Rep. 139: Johnson v. Southern P. Co. 196 U.S. 1, 18, 19, 49 L. Ed. 363, 369, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, and cases cited."

Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections the word or phrase will not be restricted to its immediate antecedent, *U.S. v. Babbit*, 1 Black 55, 61, (1862); *U.S. v. Brandenburg*, 144 F.2d 656 (3rd Cir. 1944).

II

Respondent failed to meet head-on any constitutional questions raised including the crucial question of retroactive payments. And, in the Petition for Writ of Certiorari, the 1974 Amendment does not touch the retroactive aspect raised in the Petition for Certiorari.

That issue is also still before this court regarding the constitutional restriction upon Congress to interfere with current appropriations of a sovereign State and is of such gravity that this reason alone should be sufficient for granting the Writ.

CONCLUSION

In view of the 1974 Amendment to the Fair Labor Standards Act it is increasingly important that this court grant the Petition of Certiorari to clarify previous decisions and their implications. [Reasons for Granting Writ IV with citations -- p. 8 Petition for Writ]

Other reasons for granting the Writ are not solved by nor mooted by the 1974 Amendment [p. 7 Petition for Writ] and thus Petitioner respectfully requests this court to honor its request that a Writ of Certiorari be granted.

Respectfully submitted,

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